

## § 655.2

(a) *Purpose.* The temporary labor certification reflects a determination by the Secretary that:

(1) There are not sufficient U.S. workers who are qualified and who will be available to perform the temporary services or labor for which an employer desires to hire foreign workers, and that

(2) The employment of the H-2B worker(s) will not adversely affect the wages and working conditions of U.S. workers similarly employed.

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the temporary employment of nonimmigrant foreign workers in the H-2B visa category, as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(b). It also establishes obligations with respect to the terms and conditions of the temporary labor certification with which H-2B employers must comply, as well as their obligations to H-2B workers and workers in corresponding employment. Additionally, this subpart sets forth integrity measures for ensuring employers' continued compliance with the terms and conditions of the temporary labor certification.

[77 FR 10148, Feb. 21, 2012]

### § 655.2 Authority of the agencies, offices, and divisions in the Department of Labor.

(a) *Authority and role of the Office of Foreign Labor Certification (OFLC).* The Secretary has delegated her authority to make determinations under this subpart, pursuant to 8 CFR 214.2(h)(6)(iv), to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to OFLC. Determinations on an *Application for Temporary Employment Certification* in the H-2B program are made by the Administrator, OFLC who, in turn, may delegate this responsibility to designated staff members, e.g., a Certifying Officer (CO).

(b) *Authority of the Wage and Hour Division (WHD).* Pursuant to its authority under the INA, 8 U.S.C. 1184(c)(14)(B), DHS has delegated to the Secretary certain investigatory and law enforcement functions with respect to terms and conditions of employment in the H-2B program. The Secretary has, in

## 20 CFR Ch. V (4–1–14 Edition)

turn, delegated that authority to WHD. The regulations governing WHD investigation and enforcement functions, including those related to the enforcement of temporary labor certifications, issued under this subpart, may be found in 29 CFR part 503.

(c) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy under § 655.73 or under 29 CFR 503.24.

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### § 655.3 Territory of Guam.

Subpart A of this part does not apply to temporary employment in the Territory of Guam, except that an employer seeking certification for a job opportunity on Guam must obtain a prevailing wage from the Department in accordance with § 655.10 of this subpart. The U.S. Department of Labor (Department or DOL) does not certify to the United States Citizenship and Immigration Services (USCIS) of DHS the temporary employment of nonimmigrant foreign workers under H-2B visas, or enforce compliance with the provisions of the H-2B visa program, in the Territory of Guam. Under DHS regulations, administration of the H-2B temporary labor certification program is undertaken by the Governor of Guam, or the Governor's designated representative.

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### § 655.4 Special procedures.

To provide for a limited degree of flexibility in carrying out the Secretary's responsibilities, the Administrator, OFLC has the authority to establish, continue, revise, or revoke special procedures in the form of variances for processing certain H-2B applications. Employers must request and demonstrate in writing to the Administrator, OFLC that special procedures are necessary. Before making determinations under this section, the Administrator, OFLC may consult with affected employers and worker representatives. Special procedures in place on the effective date of this regulation, including special procedures

currently in effect for handling applications for tree planters and related reforestation workers, professional athletes, boilermakers coming to the U.S. on an emergency basis, and professional entertainers, will remain in force until modified or withdrawn by the Administrator, OFLC.

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**§ 655.5 Definition of terms.**

For purposes of this subpart:

*Act* means the Immigration and Nationality Act or INA, as amended, 8 U.S.C. 1101 *et seq.*

*Administrative Law Judge (ALJ)* means a person within the Department's Office of Administrative Law Judges appointed under 5 U.S.C. 3105.

*Administrator, Office of Foreign Labor Certification (OFLC)* means the primary official of the Office of Foreign Labor Certification, ETA, or the Administrator's designee.

*Administrator, Wage and Hour Division (WHD)* means the primary official of the WHD, or the Administrator's designee.

*Agent.* (1) *Agent* means a legal entity or person who:

(i) Is authorized to act on behalf of an employer for temporary non-agricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this part with respect to a specific application; and

(iii) Is not an association or other organization of employers.

(2) No agent who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

*Agricultural labor or services* means those duties and occupations defined in subpart B of this part.

*Applicant* means a U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* (ETA Form 9142 and the appropriate appendices).

*Application for Temporary Employment Certification* means the Office of Man-

agement and Budget (OMB)-approved ETA Form 9142 and the appropriate appendices, a valid wage determination, as required by § 655.10, and a subsequently-filed U.S. worker recruitment report, submitted by an employer to secure a temporary labor certification determination from DOL.

*Area of intended employment* means the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which the certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., average commuting times, barriers to reaching the worksite, or quality of the regional transportation network). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

*Area of substantial unemployment* means a contiguous area with a population of at least 10,000 in which there is an average unemployment rate equal to or exceeding 6.5 percent for the 12 months preceding the determination of such areas made by the ETA.

*Attorney* means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the U.S., or the District of Columbia. No attorney who is under suspension, debarment, expulsion, disbarment, or otherwise restricted from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this subpart.

*Board of Alien Labor Certification Appeals (BALCA or Board)* means the permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge (Chief ALJ),